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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 106

STAPLING MACHINES COMPANY,
Appellant,

vs.

A. H. STONE, Chairman, State Tax Commission of the State of Mississippi and J. E. STONE, General Counsel for the State Tax Commission of the State of Mississippi.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

John E. Stone,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 106

STAPLING MACHINES COMPANY,
Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee in the above-entitled cause for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

Statement of Facts and Issues on Appeal

This is an appeal from a decision rendered by the Supreme Court of the State of Mississippi on March 22, 1954, and reported in the Southern Reporter advance sheet as

71 So. (2d) 205. Appellant is a Delaware corporation, having a place of business in Rockaway, New Jersey. It leased, under written contract, to various persons in the State of Mississippi certain box making machines upon which it held patents. The lessees did not obtain title to the property, such title remaining in the appellant, and lessees obtaining only the right to the use of the machines. Appellant had no office or agent within the State of Mississippi.

Under the terms of the lease the appellant agreed to furnish repair parts. Its agents were granted access to the machines for inspection and sketching, and lessees were required to keep accurate records of the operation of said machines separate and apart from its other business and subject to examination by appellant's agents, who had the right to make copies thereof. The lessees were further required to report, in writing, to appellant each month the number of boxes delivered during the past month, to whom sold and the amount of the gross sales thereof.

The machines were used for the manufacture of both patented and unpatented boxes and the consideration paid for the use of the machines was (a) the cost of production of said machines; (b) sums of money equal to four per cent of the gross sales of the patented boxes, and (c) sums of money equal to two per cent on the gross sales of all unpatented boxes.

Section 10111, Mississippi Code of 1942 (Recompiled), the material part of which reads as follows:

> "(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business:
>
> . . . . . .
>
> "Renting or leasing of tangible personal property . . ."

The appellee herein assessed appellant sales tax at the rate of two per cent on that portion of the consideration which the appellee administratively and sitting as a quasi judicial body in the administration of the state tax laws of the State of Mississippi had determined to be rental on said machines as contrasted with that portion of the consideration which appellee had found to be royalty. Appellant contends that all moneys earned by the machines are royalties and being intangibles are governed by the principle of *mobilia sequuntur personam* and are taxable at the domicile of the appellant only. The lease provided that the lessees agreed to pay such sums as royalty for the use of any or all of the patented inventions licensed to be used and/or as a royalty for the use of any or all machines leased hereunder (R. 10). Since under the terms of the lease lessees were to pay two per cent on the gross sales of unpatented boxes the appellee found that appellant was liable for two per cent as rental on said machines since four per cent was provided for as compensation according to the terms of the lease for the manufacture of patented boxes, thus indicating that the remaining two per cent was rental, which decision was upheld by the Supreme Court of the State of Mississippi.

II

No Substantial Federal Question Is Involved In This Cause

(A)

Doctrine of Mobilia Sequuntur Personam Has No Constitutional Guarantee

Appellant has predicated its entire case upon the doctrine of *mobilia sequuntur personam* which doctrine found its highest expression in the case of *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 76 L. Ed. 313, 52 S. Ct. 174, 77 A. L. R. 1401, but which case was subsequently specifi-

cally overruled by this Court in *State Tax Commission of Utah* v. *Aldrich*, 316 U. S. 174, 181, 86 L. Ed. 1358, 1370, 62 S. Ct. 1008, 139 A. L. R. 1435, wherein this Court stated:

> "For the reasons stated we do not think that First Nat. Bank vs. Maine should survive. We overrule it. In line with our recent decisions in Curry v. McCanless, Graves v. Elliott and Graves v. Schmidlapp we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State . . ."

Where the owner of property, regardless of whether tangible or intangible, moves the property or his activities to a place other than his domicile he invokes the protection and benefits of the laws of another state and, therefore, subjects himself to the tax laws thereof, *Curry* vs. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162 and the plea of double taxation is unavailable. *State Tax Commission* vs. *Aldrich*, 316 U. S. 174, 86 L. Ed. 1358, 62 S. Ct. 1008, 139 A. L. R. 1436, *Curry* vs. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162; *Blackstone* vs. *Miller*, 188 U. S. 189, 47 L. Ed. 438, 23 S. Ct. 277. In this case there was no intimation in any of the pleadings whatsoever that taxes had been paid upon either rentals or royalties earned by these machines to any other state on this property, therefore, under no circumstances of this case has appellant ever so much as raised a substantial Federal question.

(B)

INTERSTATE COMMERCE MAY BE MADE TO PAY ITS WAY

The appellant raised no Federal question in its declaration filed in the State Court, unless the mere recital ". . . all of which transactions are in Interstate Commerce," (R. 3) be deemed to raise a Federal question. Certainly the question of whether this taxation was a violation of the Interstate Commerce Clause of the United States Consti-

tution was the only Federal question ever referred to by the Supreme Court of Mississippi in its opinion (R. 125).

This Court has already held that interstate commerce may be made to pay its way.

Spector Motor Service, Inc., vs. *O'Connor*, 340 U. S. 602, 61 S. Ct. 508, 95 L. Ed. 573;

Freeman vs. *Hewit*, 320 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

It is only the *regulation* of interstate commerce which is reserved to the Congress.

> ". . . Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 569.

The tax imposed by the State of Mississippi and complained of herein by appellant is no different as regards appellant than it is as to the citizens of the State. Nor is it a tax upon the privilege of actually engaging in interstate commerce as was held to be violative of the "commerce clause" in *Spector Motor Service Inc.*, vs. *O'Connor*, 340 U. S. 602, 61 S. Ct. 508, 95 L. Ed. 573.

III

The Operating Incidence of This Tax Is Not Upon Interstate Commerce, as Such, but Upon Activities Which Have Become Localized Within the Borders of the State.

The mere fact that appellant was a foreign corporation and that the rent or royalty was paid by mail was not sufficient to relieve it of tax liability under the "commerce

clause" for its activities may become localized and, therefore, subject to state taxation.

International Harvester Co. vs. *Wisconsin Department of Taxation*, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373;

New York vs. *Graves*, 299 U. S. 366, 57 S. Ct. 237, 81 L. Ed. 285;

Curry v. *McCanless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339.

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. . . ."

McGoldrick vs. *Berwind-White Coal Mining Co.*, supra.

Interstate commerce not only may be made to pay its way but also may be made to pay for the protection it receives from the particular state.

Memphis Natural Gas Co. vs. *Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832.

All of this brief is written admitting, for the sake of argument only, that appellant's activities were in interstate commerce and it has been pointed out that even then appellant's position is not only untenable on the merits but does not even raise a substantial Federal question. In addition to all of this there is the principle that this court is bound by the construction of a state taxing statute as announced by the highest court of the State.

Memphis Natural Gas Company vs. *Stone*, supra.

In this case the Supreme Court of Mississippi has specifically held that the tax was laid upon a local activity rather than upon interstate commerce. The appellee itself in making every possible effort to refrain from violating the in-

terstate commerce clause has placed no tax whatever upon the royalty exacted but has placed the tax only upon that portion of the consideration which it found to be a rental.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Mississippi be affirmed.

JOHN E. STONE,
Counsel for Appellees.